Supreme Court, U.S.
FILED
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No. 98 855

IN THE Supreme Court of the United States

OCTOBER TERM, 1998

BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN,
Petitioner,

v.

THE MARSHFIELD CLINIC and SECURITY HEALTH PLAN OF WISCONSIN, INC.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

118 pp

QUESTIONS PRESENTED

1. Whether a plaintiff that paid above-market prices to buy services from a seller that was engaged in a *per se* illegal division of markets with competitors may be denied the opportunity to seek damages from a jury because it has not produced evidence demonstrating to the court's satisfaction the precise amount of economic harm caused by the illegal conduct as opposed to other conduct found to be legal.

2. Whether an antitrust plaintiff that has successfully proved a *per se* violation of the Sherman Act may be denied the opportunity to present its damages claims to a jury based on the court's conclusion that the plaintiff's damages experts were not credible, even when the court acknowledged that the expert reports it rejected had used legally valid and appropriate scientific methodologies.

PARTIES IN THE COURT BELOW

The parties in the court below were as follows:

Blue Cross & Blue Shield United of Wisconsin
Compcare Health Services Insurance Corporation
The Marshfield Clinic
Security Health Plan of Wisconsin, Inc.

Blue Cross & Blue Shield United of Wisconsin is a Wisconsin corporation. It has no parent corporation. It has a partial ownership interest in United Wisconsin Services, Inc., a publicly traded Wisconsin company, which in turn owns Compcare Health Services Insurance Corp.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioner Blue Cross & Blue Shield United of Wisconsin ("Blue Cross") seeks review of a decision of the United States Court of Appeals for the Seventh Circuit affirming the denial of damages entered by Summary Judgment in the District Court for the Western District of Wisconsin.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 152 F.3d 588 (7th Cir. 1998), and is reproduced at Pet. App. 1a. The order denying rehearing is reproduced at Pet. App. 84a. A prior decision of the Court of Appeals is reported at 65 F.3d 146 and reproduced at Pet. App. 14a.

Various memorandum opinions and orders of the District Court, on remand after the prior appeal, are unreported and reproduced as Appendices D through H.

JURISDICTION

The decision of the court of appeals was issued July 30, 1998. The order of the court of appeals denying a timely request for rehearing was issued on August 25, 1998. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2, and Section 4 of the Clayton Act, 15 U.S.C. § 15(a), are reproduced at Pet. App. 85a.

STATEMENT OF THE CASE

Marshfield Clinic, a large provider of medical services in north-central Wisconsin, violated Section 1 of the Sherman Act. Pet. App. 2a-3a, 14a-15a. A jury found the violation, the Seventh Circuit Court of Appeals affirmed the finding, and the district court entered a further Order on remand confirming a broad-based conspiracy between the fifth-largest physician clinic in the United States (with a quarter of a billion dollars in annual revenue) and numerous potential competitors. *Id.* at 40a-43a. This matter now comes to this Court after a second opinion of the Seventh Circuit incorrectly set standards for assessing damages in a Section 1 antitrust case.

This matter was tried to a jury in 1994-95. Petitioner claimed at the time that respondents had violated Sections 1 and 2 of the Sherman Act by dividing markets and fixing prices with competitors and by monopolizing the delivery of medical services in a manner that excluded competing health maintenance organizations from operating in certain Wisconsin counties. The jury found for plaintiffs and awarded damages. On appeal, in 1995, only the jury's finding of liability for dividing markets was affirmed by the Seventh Circuit. Pet. App. 32a. In affirming the liability, the court of appeals aptly noted:

> The analogy between price-fixing and division of markets is compelling. It would be a strange interpretation of antitrust law that forbade competitors to agree on what price to charge, thus eliminating price competition among them, but allowed them to divide markets, thus eliminating all competition among them.

Id. at 31a. Because the first jury did not award separate damages for claims reversed by the Court, the case was remanded to the district court for Blue Cross to show "how much less it would have paid the Clinic had the Clinic refrained from that illegal practice [*i.e.*, market division]." *Id.* at 33a.

On remand, Blue Cross followed accepted principles of calculation in preparing to demonstrate the amount of damages, utilizing both direct evidence and expert analysis. The direct evidence, much of it developed at the first liability trial, showed, for example, that Marshfield Clinic sold services to parties outside the area of the conspiracy for between 10% and 15% less than in the divided areas. (Tr. Exhs. 10320, 1968; R. 296, pp. 272-75) *See also Blue Cross and Blue Shield of Wis. v. Marshfield Clinic*, 883 F. Supp. 1247, 1259 (W.D. Wis), *aff'd in part and rev'd in part*, 65 F.3d 1406 (7th Cir. 1995). The defendant Marshfield Clinic even sold services to a Blue Cross joint venture, Valley Health Plan, at a lower price, because it was outside the area of the market division agreements. (R. 296, pp. 453-55; R. 431, p. 1088)

As further evidence of the damage amount, Blue Cross submitted the reports of two experts, Dr. John Beyer and Professor Thomas McGuire.

Professor McGuire, a nationally recognized health care economist, began his study by assuming the market division to be exactly as described by the Seventh Circuit and by defining the area of likely effect. He tested market

power of the conspirators across a broad range of services by analyzing, statistically, their combined market shares. He found the conspirators together accounted for more than 70% of all the medical services in the affected areas (R. 699 at 18-21, exhs. 7-8). Having established study parameters, Professor McGuire then tested, through widely accepted statistical and regression methods, to determine if, as a general matter, there were disparities in the costs paid by Blue Cross within and outside this area on a per user basis. (R. 682 at 12-13) Not unexpectedly, given the proof of conspiracy, he found a statistically significant relationship.

Cognizant that quality of care might explain differences in cost, Dr. McGuire again used accepted techniques to test the relationship between quality and cost by establishing 1988 as a baseline year. (R. 682 at 13) By 1988, Marshfield's quality of care, case mix and other legal activities were in place. (*Id.*) The quality effect, already in place in 1988, could then be removed by examining changes in relationship with Marshfield's charges from 1988 forward. McGuire utilized overall cost by county and fixed-effects models commonly used in economic studies of health care costs (R. 733, ¶ 11, exh. 4; R. 807, ¶ 18)), so that Marshfield would be given the full benefit of any quality price premium. (R. 699 at 3-5, 28-29; R. 682 at 13-14; R. 775 at 11, 16-17).

Professor McGuire also controlled for a host of factors by taking into account the demographic characteristics of the population served by Marshfield. He compared county by county for the entire State of Wisconsin, utilizing multivariate regressions, to control for those differences in population mix. (R. 682 at 14, exhs. 7-8; R. 699 at 21-22 exh. 5) To further assure himself that case mix, *i.e.*, intensity of care, was not a factor in the substantial increases in Marshfield costs during the period of the conspiracy, Professor McGuire studied the phy-

sician mix at the Clinic and found the Clinic was becoming less sophisticated in its care between 1988 and 1994, the time of the conspiracy. (R. 699, exh. 6) In addressing the further possibility that Marshfield's large market share in the region might affect costs, the professor completed a regression study computing a standard HHI index for concentration and comparing again every county in the State. (R. 775 at 20) He found the relationship of his estimated damage amount and the conspiratorial conduct in the area was unaffected. (*Id.* at 21, exh. 11)

Based on his expert knowledge of the market for medical care, Professor McGuire concluded that it was appropriate to study not just the higher *prices* charged by Marshfield in the areas affected by the conspiracy, but the total cost per patient—thus including costs incurred when doctors ordered a higher *quantity* of services for given diagnoses. From his regression analyses, McGuire was able to determine a damage amount of $6.9 million (R. 699, exh. 4), or 14% of total payments during the affected period. This calculated amount was within the range already estimated by the direct evidence discussed above—*i.e.*, 10%-15%.

In order to test these results in yet a third way, Blue Cross engaged a second economics expert to calculate damages by using a "yardstick"—a long-accepted methodology for antitrust damage calculation. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 257-60 (1946). Dr. John Beyer chose a nearby area, Eau Claire, Wisconsin, where medical services comparable to those provided at Marshfield are available from providers that include a high-quality medical center—the Midelfort Clinic, owned by the renowned Mayo Clinic. As the quality of care was at least as high, due to the presence of a Mayo Clinic, in the comparable area, the study by its very nature controlled for quality, one possible alternative reason for higher prices. After studying the areas

to assure comparability (R. 681 at 7-8), Dr. Beyer then compared the price charged by Marshfield to the price charged by others. He, too, found specific significant price differences. (R. 681 at 10-11; R. 766 at 4-5, tables 1-2)

In order to control for case mix, Dr. Beyer, through a series of computer analyses, grouped charges by like physicians providing like services. (R. 697 at 13-15, 17-20) To control for quantities, only amounts actually bought by Blue Cross were used in calculation. (R. 681 at 10, exh. 13)

Recognizing that Marshfield's large market share, even without the conspiracy, might be a factor in pricing, Dr. Beyer studied the relative market shares of Mayo's Midelfort Clinic in the comparison area, and found that its market share in the Eau Claire, Wisconsin area was at least as high as Marshfield's share in the area surrounding Marshfield, Wisconsin. (R. 766 at 4-5) When criticism was leveled about the need to compare Marshfield directly to a "comparable clinic," rather than an entire area, Dr. Beyer performed a direct comparison to Dean Clinic, a multispecialty clinic headquartered in Madison, Wisconsin, and he again found substantial overcharges by Marshfield. (*Id.* at 4) Finally, Dr. Beyer compared Marshfield to all physicians of identical specialties and case mix statewide, and again found a substantial and specific overcharge during the period of the conspiracy. (R. 681 at 8, 11; R. 766 at 8)

Having completed his study, Dr. Beyer estimated damages in a range of $6.7 million to $7.1 million, or 15% of the total paid by Blue Cross to Marshfield Clinic. (R. 766, ¶ 18) Again, these estimates fell within the range originally predicted based on the evidence of direct charges and discounts by the co-conspirators.

On the eve of the damages trial, defendants moved for summary judgment, arguing that petitioner's expert re-

ports (1) improperly considered one category of petitioner's business and various product markets that were foreclosed from consideration after the prior trial and (2) did not separate out damages caused by the market division conspiracy. The district court initially treated the motion as a motion in limine and granted that motion. It questioned whether the experts had adequately considered the possibility that Marshfield's perceived higher quality of care might explain the payment differentials they identified, but the court did not rely on that ground. Pet. App. 64a-65a. Instead, it ruled that the experts' prospective testimony was inadmissible because it did not adequately separate out higher payments caused by conduct (other than market division) that the Seventh Circuit had found to be legal in the prior appeal. Pet. App. 65a.[1] But the court did not explain how it could square this conclusion with the various features of petitioner's experts' studies designed to do just that.[2] Six days later,

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[1] The district court expressed skepticism about the fact that petitioner's experts claimed to have identified damages caused by the market division conspiracy more than ten times greater than the amount of damages—for a broader range of alleged misconduct—allowed to stand by the district court after the first trial (*i.e.*, $594,000). But that figure reflected the limitations on product markets and categories of petitioner's business that were a part of monopoly markets reversed earlier by the court of appeals. If those same limitations were applied to petitioner's experts' new reports, their claimed damages would be reduced to the same order of magnitude—approximately $700,000 to $1 million—even though they were studying a period of injury two years longer. There was thus no reason, based on the absolute amount of damages claimed as compared to the prior remittitur amount, to discredit petitioner's experts in any respect.

[2] The court also expressed "concerns" about Professor McGuire's reliance, not on price alone, but on payments per patient. Pet. App. 9a-10a. It noted that, in most markets, anti-competitive conduct results in a price increase and an output decrease. Pet. App. 9a. The court stated that McGuire "may be correct" in opining that

the district court ruled that petitioner's direct (non-expert) evidence of damages was insufficient on its own and refused to delay the trial to allow petitioner's experts to address the concerns raised by the court. It accordingly granted summary judgment to respondents on the issue of damages, holding that petitioner's evidence failed to create even a triable issue with respect to the amount of injury caused by respondents' *per se* violation of the Sherman Act.[3]

On appeal, the Seventh Circuit affirmed in relevant part, albeit not on all of the grounds cited by the district court. The Seventh Circuit acknowledged that price comparisons are a long-accepted methodology for measuring Section 1 damages. Pet. App. 6a. Without discussing any of the details of Dr. Beyer's work, other than to acknowledge that he had used a potentially valid "yardstick" methodology, the court dismissed that study for failing to be "properly adjusted." The court of appeals asserted that Beyer's study attributed "the entire difference between the prices of the Marshfield Clinic and the prices of other Wisconsin providers of medical services to the division of markets, with no correction for any other factor except differences in the treatment mix." Pet. App. 8a. As to Professor McGuire's extensive reports, which the court acknowledged were "more prom-

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medical markets operate differently, but held that he had "failed to show" that his approach is "generally accepted." Pet. App. 67a. In so doing, the court did not note the fact that it was a simple matter to extract from Professor McGuire's work a smaller, but still substantial, damages figure based on price differentials alone.

[3] In a subsequent order, the district court vacated its injunction barring future violations, on the theory that a party seeking to enjoin *per se* illegal conduct has to show actual injury. Pet. App. 80a. On appeal, the Seventh Circuit reinstated the injunction, on the ground that a party seeking injunctive relief need only show a likelihood of some injury. Pet. App. 3a-5a.

ising" Pet. App. 8a, the court of appeals concluded that he failed to adjust for proper increases in quantity of care (even though Professor McGuire statistically demonstrated untoward increases in quantity that caused, in part, the extraordinary costs paid by petitioner) and failed to adjust for possibly sicker patients. Pet. App. 9a-10a.

The Seventh Circuit opinion makes no reference to the summary judgment standard, no reference to the standard for evaluating damages claims, and no reference to the standard for evaluating statistical evidence and expert reports.

The court of appeals denied a petition for rehearing. Pet. App. 84a.

REASONS FOR GRANTING THE WRIT

This case raises an important question concerning the appropriate standard for determining whether an antitrust plaintiff who has successfully proved a *per se* violation of the Sherman Act has presented sufficient evidence of injury to survive a motion for summary judgment. Here, both parties' experts acknowledged that some quantum of damages flowed proximately from respondent's unlawful market-division conspiracy, and the court of appeals itself found it "likely" that petitioner had to pay higher prices as a result of the conspiracy. Nevertheless, the court declined to let the jury consider damages, because in its view petitioner's experts had not adequately considered the degree to which petitioner might also have been damaged as a result of other, lawful conduct.

In so ruling, the court of appeals confused two distinct "injury" issues that arise in private antitrust actions seeking damages, and the distinct burdens of proof that apply to each. First, as part of its prima facie case, a plaintiff must establish "some damage flowing from the unlawful conspiracy." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) (citations omitted).

Concerning that issue, "courts apply the ordinary standard of proof," *Rossi v. Standard Roofing Inc.*, 156 F.3d 452, 484 (3d Cir. 1998), but there is no duty to specify the amount of injury; "proof of *some* [injury] flowing from the unlawful conspiracy" is sufficient. *Zenith*, 395 U.S. at 114 n.9 (emphasis in original). Once some injury is established, the plaintiff has the further duty to submit evidence showing the amount of damages it should be awarded, but as to that issue, "the ordinary standard of proof . . . is somewhat relaxed." *Rossi*, 156 F.3d at 484. The "jury may make a just and reasonable estimate of the damage based on relevant data," relying upon "probable and inferential, as well as . . . direct and positive proof," because "[a]ny other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim." *Bigelow*, 327 U.S. at 264.

The legal question presented here is whether an antitrust plaintiff's failure to separate out, with convincing precision, the amount of damages caused by factors other than the illegal conspiracy is properly considered at the first stage of the analysis—as a basis for concluding (1) that the plaintiff has failed to establish "some injury" caused by the illegal acts and thus (2) that the plaintiff is not entitled to invoke the relaxed standard of proof applicable when the question is the *amount* of injury caused by those acts. Although it was undisputed that the Marshfield Clinic charged petitioner more than other Wisconsin providers charged during the period of the illegal market division, the Seventh Circuit concluded (erroneously in our view, *see* Part II *infra*) that petitioner had failed to surmount the first injury hurdle because its evidence did not sufficiently disaggregate the conspiracy from other factors—such as quality and market share—that might also have contributed to these added costs.

That was clear error. This Court has held that it "is enough that the illegality is shown to be *a* material cause of the injury; a plaintiff need not exhaust all possible

alternative sources of injury in fulfilling his burden of proving compensable injury." *Zenith*, 395 U.S. at 114 n.9 (emphasis added). The reason is that, if an inability to separate the "material causes" with precision is treated as a failure to establish causation of some injury, the benefits of the relaxed standard of proof at the second stage will always be negated. Under the Seventh Circuit's approach, in any case where "direct and positive proof" of the specific amount of injury solely caused by the antitrust violation cannot be established with precision, the plaintiff will not be able to rely on a "reasonable and just estimate," as *Bigelow* mandates, because the lack of precision will be treated as a failure to establish *any* injury and the question of the amount of damages to be awarded will never arise. Because this approach is both wrong under this Court's governing precedents and typical of the confusion that has arisen in other similar cases in the lower courts, this Court should grant review to clarify the standards governing proof of damages claims under the antitrust laws.

The Court should also grant review to clarify the appropriate role of the court in assessing expert evidence of antitrust damages, prior to the presentation of that evidence at trial. The district court and the court of appeals in this case evinced a remarkable willingness to criticize as unconvincing, based on a paper record, expert studies that used methodologies the courts acknowledged to be standard in antitrust litigation. In so doing, they ignored the basic principle of Fed. R. Civ. P. 56 that the evidence of the party against whom summary judgment is sought must be accepted, rather than disregarded based on the conflicting evidence of the moving party.

I. THE SEVENTH CIRCUIT'S DECISION ERRONEOUSLY IMPOSES A HEIGHTENED BURDEN OF PROOF ON ANTITRUST PLAINTIFFS TO SHOW THAT THE DAMAGES THEY ALLEGE COULD NOT BE ATTRIBUTABLE TO SOME ACTION OTHER THAN THE UNLAWFUL ACTION ESTABLISHED IN THEIR CASE.

By the time of the rulings at issue here, it was established that respondents had entered into an illegal agreement to divide up the market with competitors, for the purpose of "charg[ing] higher prices to its customers." Pet. App. 4a. Given that *per se* violation of the Sherman Act, the Seventh Circuit noted that petitioner is "a major customer of the Clinic that is likely to have to pay higher prices." *Id.* It nevertheless declined to allow the jury to consider the question of damages against Marshfield because Blue Cross did not "prov[e] with the degree of precision required" the exact amount of the damages it suffered. *Id.* at 5a. In reaching this conclusion, the court rejected as legally inadequate two expert reports each concluding that Blue Cross paid almost $7 million more for services than it would have absent the conspiracy, because in the court's view those reports did not take sufficiently into account "[a]ny nonconspiratorial factors likely to have made the prices charged by the Marshfield Clinic higher than the prices charged by other health-care providers." *Id.* at 6a. The court reached this conclusion even though respondents' own experts acknowledged that the defendants' misconduct caused petitioner *some* damage, and even though it acknowledged that the petitioner's expert's statistical methods were "not improper". Pet. App. 6a.

An essential component of antitrust enforcement is the right of a private party to seek and obtain damages. As this Court has noted, "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating busi-

ness behavior in violation of the antitrust laws. . . . [T]he law encourages [the private party's] suit to further the overriding policy in favor of competition." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

Because private damages suits play an important role in enforcing the Nation's antitrust laws, and because by their conduct antitrust violators often make it difficult or impossible to determine with precision the exact measure of the appropriate damages, the courts have long allowed juries to make "a just and reasonable estimate [of damages] based on relevant data," relying upon both "probable and inferential, as well as . . . direct and positive proof." *Bigelow*, 327 U.S. at 264. "If the damage is certain, the fact that its extent is uncertain does not prevent a recovery." *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 566 (1931). "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of the victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude recovery, by rendering the measure of damages uncertain." *Bigelow*, 327 U.S. at 264-65. "Accordingly, 'where there is a basis on which a jury can reasonably infer significant antitrust injury, [the court] should be very hesitant before determining that damages cannot be awarded.'" *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785, 823 (2d Cir. 1983) (citation omitted).

This being so, "there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount." *Story Parchment Co.*, 282 U.S. at 562; *Rossi*, 156 F.3d at 484. In determining whether the plaintiff has carried its burden of proving some injury, no matter how small, courts require plaintiffs to prove with "reasonable cer-

tainty" that injury has occurred. *SCM Corp. v. Radio Corp. of America*, 407 F.2d 166 (2d Cir. 1969). But in considering the precise amount of damages, courts apply the more relaxed standard.

Here, in the guise of applying the former requirement, the Seventh Circuit subjected petitioner's expert reports to the most rigorous review, and refused to allow the matter to proceed to the jury for a damages calculation because in the appellate court's view the experts had not properly considered all of the other possible reasons that could explain why plaintiffs had paid more than they should have for medical services. The Seventh Circuit thus treated the failure adequately to disaggregate injury claims as a threshold matter that goes to whether or not the plaintiff has proved any injury at all.

This approach is not unprecedented. Other courts similarly have found that a plaintiff's failure to disaggregate claims is fatal to their damages case, usually on the theory that failure properly to disaggregate claims would lead the jury to engage in undue speculation. *See, e.g., Greater Rockford Energy and Technology Corp. v. Shell Oil Co.*, 998 F.2d 391, 401-04 (7th Cir. 1993) (granting summary judgment because "plaintiff have failed to show with a fair degree of certainty that the antitrust violation was a material and substantial factor causing their alleged injuries"); *City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1372 (9th Cir. 1992); *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1165 (7th Cir. 1987) (judgment vacated when "there was no evidence of how much the antitrust violation, as distinct from unrelated market forces, contributed to [plaintiff's] losses"); *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1350-52 (9th Cir. 1985); *Alleghany Pepsi-Cola Bottling Co. v. Mid-Atlantic Coca-Cola Bottling Co.*, 690 F.2d 411, 414-15 (4th Cir. 1982). *See generally* M. Sean Royall, *Disaggregation of Antitrust Damages*, 65 Antitrust L. J. 311 (1997).

On the other hand, other courts have been more faithful to this Court's precedents and concluded that to survive summary judgment a plaintiff "need only establish that [the defendant's] alleged violations had a tendency to injure [the plaintiff's] business, and [the plaintiff] suffered a decline in its business 'not shown to be attributable to other causes.' " *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1495 (8th Cir. 1992). *See also Rossi*, 156 F.3d at 484; *Sullivan v. National Football League*, 34 F.3d 1091, 1105-06 (1st Cir. 1994) (not error to allow jury to consider expert report in antitrust case even though report left "much to be desired from the standpoint of a factfinder" because it failed to take into account "some important factors"); *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158, 1163 (9th Cir. 1991) (plaintiff's claim not improperly speculative merely because its expert "conceded that other factors might have contributed to the revenue drop"); *National Farmers' Org., Inc. v. Associated Milk Producers, Inc.*, 850 F.2d 1286 (8th Cir. 1988); *Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986) ("appellants need not rule out 'all possible alternative sources of injury,' [but], they must show that the alleged anticompetitive activity was 'a material cause of the injury' " (citation omitted)); *Continental Baking Co. v. Old Homestead Bread Co.*, 476 F.2d 97, 105 (10th Cir. 1973); *see also Bazemore v. Friday*, 478 U.S. 385, 400 (1986) ("Importantly, it is clear that a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty.") (citation omitted).

The latter approach is clearly the correct one:

> [T]o require proof that the illegal conduct was the *exclusive* cause of the plaintiff's injury would effectively deny private remedies, for multiple causes always affect everyone. . . . It is therefore enough

> that the antitrust violation contributes significantly to the plaintiff's injury even if other factors amounted in the aggregate to a more substantial cause. . . . If the plaintiff's claim of causation is plausible, it should not be dismissed summarily merely because alternative causation stories are plausible as well.

2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 363a at 219-22 (1995). In an oft-quoted portion of the seminal *Zenith Radio* decision, the Court held that it is enough at the initial stage to show that illegal conduct was "*a* material cause of the injury; a plaintiff *need not exhaust all possible alternative sources of injury* in fulfilling his burden of proving compensable injury under § 4" of the Clayton Act. 395 U.S. at 114 n.9 (emphasis added). It went on to rule that the plaintiff had satisfied its burden by showing (1) illegal conduct and (2) financial injury of "precisely the type . . . that the claimed violations of the antitrust laws would be likely to cause," thus entitling the trial court to "infer from this circumstantial evidence that the necessary causal relation between the . . . conduct and the claimed damage existed." *Id.* at 125. *See also Amerinet*, 972 F.2d at 1495. Courts applying the more heightened standard, by contrast, require much more: that the plaintiff supply affirmative evidence that a specific quantum of injury was solely caused by the antitrust violation.

A good example of how *Zenith Radio* has been correctly applied in some lower courts is the Ninth Circuit's ruling in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1051 (9th Cir. 1981)—a decision that directly conflicts with the instant case. There, the defendant argued that it had introduced evidence "showing the existence of factors other than its own pricing activity which contributed to Inglis' failure as a business." *Id.* The court said that this evidence was insufficient to bar a claim for damages, even though the plaintiff could not separate out the precise effects of the illegal conduct and these other "factors":

> Inglis' demise was, in our view of the record, the result of a confluence of factors. In such circumstances it is difficult to identify precisely the extent to which the failure was the result of allegedly illegal conduct. However, the law does not require precision in this area. Continental's pricing need only have been a material cause of Inglis' decline, and causation may be inferred if Inglis' injury was "the type of loss that the claimed violations of the antitrust laws would be likely to cause."

Id. (quoting *Zenith Radio,* 395 U.S. at 125).

The reason for this kind of flexibility is that, without it, the first stage of the injury analysis—the showing of causation of "some injury"—swallows up the second—the showing of an amount of injury. At the second stage, the courts are solicitous of the difficulties facing plaintiffs attempting to show how much of their injuries were caused by illegal conduct as opposed to other factors, and apply a relaxed standard of proof in order to prevent defendants from avoiding financial responsibility for acts that were illegal and played a role in creating the very uncertainty at issue. But if those same difficulties lead to a finding that no "injury" has been proved at the outset, the relaxed standard will never come into play and defendants will be beneficiaries.

There could be no better example of this phenomenon than this case. In view of the fact that Marshfield charged extraordinarily high prices during the period of the conspiracy and those prices were limited to the area of the conspiracy, little more should have been required to justify the inference that the conspiracy was "a material cause of the injury." Indeed, both parties' experts agreed that there was material injury, and even the Seventh Circuit held that such injury was "likely." Yet the same court required petitioner to do exactly what the *Zenith* Court forbade—to "exhaust all possible alternative sources of injury" in order even to get the *opportunity*

(under the *Bigelow* relaxed standard) to show the amount of damages to which it was entitled.

This outcome was particularly remarkable because petitioner did *not* rely solely on an inference of injury based on Marshfield's high prices and the prior finding of an anti-competitive market-division agreement. Petitioner supplied expert reports that directly addressed, in different but hardly unprecedented ways, the difficult problem of isolating the economic effects of such an agreement. Dr. Beyer did so by examining a whole variety of "yardstick" providers, whom he had studied and was prepared to defend as comparable in quality, market share, case mix, and similar factors. Professor McGuire did so by (1) studying only relative changes in health care costs dating from the beginning of the conspiracy (thus effectively controlling for Marshfield's pre-existing reputation for quality) and (2) including in his regression studies a variety of additional variables addressing other potential causative factors. *See* pp. 3-5 *supra*.

Yet the Seventh Circuit found these studies insufficiently persuasive, in large part because both experts' damages estimates were similar to estimates made at an earlier phase of the case when there were additional antitrust allegations considered—charges that were ultimately dismissed. And it was on that point that the erroneous legal analysis of the court of appeals became most stark. The court acknowledged that "it is possible that the alleged violations were redundant . . . the Marshfield Clinic may have stacked the division of markets on top of other practices any one of which would have had the same effect on its customer's prices." Pet. App. 8a-9a. In the court's view, however, "this observation cannot help Blue Cross," because in order for it to be able to recover damages, it must establish that the violation it proved is the *exclusive* cause of the injury it alleges. *Id.* at 9a. "If [the illegal division of markets] added nothing

to the price effects of the legal practices, it did not cause Blue Cross any harm." *Id.*

Such analysis takes to its extreme the reasoning of those courts that have dismissed damages claims because they are insufficiently disaggregated, *see supra,* p. 14, allowing the plaintiff to present its damages claim to the jury only if the established violation alone could be proved to be uniquely responsible for some specific portion of plaintiff's loss. But that analysis conflicts generally with those cases that more faithfully follow this Court's teaching in *Zenith Radio* that "a plaintiff need not exhaust all possible alternative sources of injury." 395 U.S. at 114 n.9. *See Engine Specialties, Inc. v. Bombardier Ltd.,* 605 F.2d 1, 14 (1st Cir. 1979) ("Plaintiffs need not prove that the antitrust violation was the sole cause of their injury, but only that it was a material cause."). And, it conflicts directly with the law of the Eighth Circuit, which addressed the same situation and reached the opposite result:

> An antitrust plaintiff's damage claim is not . . . rendered speculative or unreasonable merely because it fails to provide for a specific reduction in the event that allegations of certain unlawful conduct are rejected. . . . [I]f an antitrust plaintiff alleges that the defendant engaged in unlawful acts A, B, C, and D, and acts C and D are later rejected as a basis of liability, it does not automatically follow that the damages award must be reduced. Rather, if acts A and B support the entire damage award, it must be sustained.

National Farmers' Org., 850 F.2d at 1307.

The Court should grant this petition to bring uniformity to the different legal rules of the courts of appeals on this important question of federal law.

II. THE SEVENTH CIRCUIT MISAPPREHENDS THE ROLE OF THE COURT IN ACCEPTING THE REASONABLE INFERENCES OF EXPERT AND RELATED EVIDENCE.

The recent cases before this Court concerning expert witnesses and the role of the court in evaluating that evidence for scientific efficacy, *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433 (11th Cir. 1997), *cert. granted, sub nom. Kumho Tire Co. v. Carmichael*, 118 S. Ct. 2339 (1998), have focused attention on the proper role of the district court in evaluating expert evidence outside the presence of the jury. Those decisions, however, do not alter the important balance established by Rule 56 of the Federal Rules of Civil Procedure, which preserves for the fact-finder the resolution of all genuine disputes of material fact.

Here, contrary to the Rule 56 standard, the court of appeals and the district court misapprehended their respective roles and, without considering *Daubert*, nonetheless rejected as a matter of law two thorough expert studies, even though they acknowledged that the basic methodologies used were legally valid and even though the studies were buttressed by confirming direct evidence. It is important for this Court, having recently expressed concern about the scientific validity of expert testimony, to review this matter in order to make clear that a summary judgment motion is not an invitation for courts to begin assessing the relative persuasiveness of competing expert opinions based on a mere paper record. This is particularly appropriate in the context of antitrust damages where the standard for measurement is more relaxed than the standard for measuring liability. *Zenith Radio*, 395 U.S. 100; *Bigelow*, 327 U.S. 251.

To begin with, both the district court and the court of appeals parsed the evidence into distinct categories—direct evidence, Dr. Beyer's expert analysis and Professor

McGuire's expert analysis. Then, each court dissected those items of proof. Such separation of the individual items of evidence is plainly contrary to the law. As this Court noted, in Section 1 conspiracy cases, "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

In damage calculation, as here, the rules requiring consideration of of all the evidence and the fairly derived inferences are not mere guides. "Trial and appellate courts alike *must* also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries . . . damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." *Zenith Radio*, 395 U.S. at 123 (emphasis added). For the court of appeals to do as it did here, parsing and splitting the evidence, sets a precedent contrary to the long history of antitrust law, *see id.* at 123-25; *Continental Ore*, 370 U.S. at 698-99; *Bigelow*, 327 U.S. at 264; *Story Parchment*, 282 U.S. at 561-64, fundamentally altering the balance between the obligations of the antitrust plaintiff and defendant by refusing to accept as true the findings of scientifically valid studies.

A more specific example of the overreaching of the courts below is their treatment of Professor McGuire's prospective testimony that illegally obtained market power in the provision of medical services can inflate the *quantity* of services provided as well as their *price*. Both courts expressed skepticism about this conclusion, noting that it departs from the usual pattern in other kinds of markets. Pet. App. 9a-10a, 66a-68a. But Professor McGuire has great experience and expertise with health care economics and was fully prepared to testify, if given the

chance, about the valid basis of his opinion. The matter of demand inducing antitrust violations has been the subject of substantial legal and scholarly analysis. *See, e.g.*, Mark R. Patterson, *Coercion, Deception and Other Related Demand Increasing Practices in Antitrust Law*, 66 Antitrust L.J. 1 (1997).

Moreover, both courts blithely asserted that there was no evidence Marshfield had increased the quantity of its services when it divided markets. Yet Professor McGuire's study itself addressed in statistical analysis (multivariate regression) that very question of unnecessary procedures, found a history of additional charges by Marshfield not charged by others (R. 682 at 12-14), and observed no outcome difference for the patients. (R. 699 at 13-14) Professor McGuire pointed as well to other experts who cited specific proofs and expert analysis concerning a *lower* quality outcome. (*Id.*) The conclusion that Marshfield Clinic's overcharges were masked in the form of additional procedures was most certainly a just and reasonable inference. Finally, Professor McGuire made clear that, even absent the phenomenon of quantity increases, his study showed substantial damages to Blue Cross based on price alone.

It is important to recognize, in this regard, that the expert studies at issue did specifically address the very factors—other than the illegal market division conspiracy —that the courts below said had not been adequately ruled out as alternative explanations of the payment differentials received by Marshfield. It is undeniable that both McGuire and Dr. Beyer addressed quality of care, market share, treatment mix, and other legal factors in their respective reports. *See* pp. 3-6 *supra*. The district court and court of appeals disagreed with those reports and believed they did provide "enough." But such disagreements are for the trier of fact, not the court acting on a motion for summary judgment. The mere presence

of experts does not enhance the role of the judge in a case to be tried to a jury.

The Court must provide guidance as to the applicable standards for review of expert studies, in conjunction with other evidence. This case provides a clear opportunity to examine those issues as the matter is before this Court on a specific summary judgment limited to a single issue —damages.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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